In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 274

K. B. & J. YOUNG'S SUPER MARKETS, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. i-iv) is not yet officially reported. The Board's decision and order (R. 28-43, 52-53)[1] are reported at 157 N.L.R.B. 271.

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[1] "R." references are to Volume I of the record reproduced for the court below, "Tr." references to the transcript of testimony in Volume II of the record.

JURISDICTION

The decree of the court of appeals (Pet. App. v-viii) was entered on April 28, 1967. The petition for a writ of certiorari was filed on June 21, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Labor Board was authorized to direct the purchaser of a business to bargain with the union representing a majority of the employees of the business, in circumstances where the purchaser took over the former operation substantially unchanged after directing that the employees be discharged as of the time of sale solely in order to avoid bargaining with the union.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are printed at pp. 2-3 of the petition.

STATEMENT

Until April 1964 Hob Nob Stores, Inc., a large retail grocery chain, owned and operated three supermarkets in Bakersfield, California, under the name of "Kelley's Markets." The meat departments of all three stores were covered by a collective bargaining agreement, effective until January 15, 1965, with Butchers Union Local 193, Amalgamated Meat Cut-

ters and Butcher Workmen of North America, AFL-CIO. (R. 29; Tr. 11-12.) As a result of the union shop clause in the agreement, all of the covered employees were members of the union (R. 37).

In April 1964, William and John Young, brothers, bought the three Kelley stores through the corporate petitioner. At the direction of the Youngs, all of the Kelley employees were notified that they were discharged effective on the sale date (R. 30-31; Tr. 246-247). After the sale was completed and the employees discharged, the stores were closed for one day and then reopened, still as "Kelley's Markets". The business at the stores remained essentially the same and the size and duties of the work force did not change materially (R. 30). Petitioner refused, however, to hire former Kelley employees unless they withdrew from the union (R. 32-33; Tr. 134-136, 209-210, 213-214, 222, 224). The union demanded that petitioner observe the unexpired collective bargaining agreement and recognize the union's representative status; petitioner refused (R. 37; Tr. 31-32, 36-37).

The Labor Board found that petitioner was the successor to Hob Nob and that it had caused the former employees to be discharged in order to avoid dealing with the union. It held that petitioner had violated Section 8(a)(3) and (1) of the National Labor Relations Act by causing the discharges [2] and Section 8(a)(5) and (1) by refusing to bargain with

[2] The Board also found that petitioner had further violated Section 8(a)(3) and (1) by discharging two new employees because of their union activity (R. 34-36). This finding is not challenged by petitioner.

the union as the representative of the discharged employees (R. 37-38, 39, 52-53). The Board ordered the company to cease and desist from the unfair labor practices found, to reinstate the discriminatorily discharged employees with back pay, and to bargain with the union as the representative of the discharged employees (R. 37-38, 39, 52-53).

The court of appeals enforced the Board's order in its entirety (Pet. App. i-iv).

ARGUMENT

The question that petitioner seeks to raise—whether the purchaser of a business is free to hire his own employees or must bargain with the representative of the seller's employees regarding their continued employment (Pet. 2, 6)—is hardly presented by the facts of this case. For, the Board—sustained by the court of appeals—found that petitioner had prior to the actual sale caused the employees to be discharged solely in order to avoid dealing with the union that was their representative and after the sale continued to operate the business without material change. It is settled law that where a purchaser takes over a business unchanged he assumes the seller's bargaining obligation. See *National Labor Relations Board* v. *Auto Ventshade, Inc.*, 276 F. 2d 303 (C.A. 5); *National Labor Relations Board* v. *Tempest Shirt Mfg. Co.*, 285 F. 2d 1 (C.A. 5); *National Labor Relations Board* v. *Armato*, 199 F. 2d 800 (C.A. 7); *John Wiley & Sons* v. *Livingston*, 376 U.S. 542. Nor was the business continuity here broken by the fact that

the employees were discharged prior to consummation of the sale. Since they were discriminatorily discharged, they remained, as a matter of law, employees of the Kelley stores when those stores were taken over by petitioner. See *National Labor Relations Board* v. *Sifers*, 171 F. 2d 63, 66 (C.A. 10); *National Labor Relations Board* v. *Cape County Milling Co.*, 140 F. 2d 543, 546 (C.A. 8). As the court of appeals put it (Pet. App. iii):

> Where, as here, the old employees have been wrongfully discharged, their reinstatement is an appropriate remedy for the unfair labor practice. With such reinstatement ordered, continuity in the identity of the work force may be presumed to follow and an order to recognize and bargain with the union as representative of the present work force is appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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